IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

HENRY L. MITCHELL, *et al.*, Trustees of the Internal Improvement Fund of the State of Florida, *et al.*, Appellants,

vs.

CHARLES M. FURMAN, Administrator of the Estate of Charles M. Furman, Deceased, *et al.*, appellees.

No. 158

Now come the Appellees in the above stated cause, by their counsel, and move the Court to dismiss the appeal taken in the above stated cause, upon the following grounds, *viz.*:

1. That the Court is not invested with jurisdiction, under the Act of March 3rd, 1891, to hear and determine said appeal.

2. That under the Act of March 3rd, 1891, the Circuit Court of Appeals for the Fifth Circuit of the United States is the only Court to which the cause could have been taken directly by appeal.

3. That the constitutionality of no law of the United States, nor the validity nor construction of any treaty made under its authority, was drawn in question in the determination if the cause in the Court below.

And in case the said motion to dismiss the said appeal should be denied, the appellees move the Court to affirm the decree appealed from, on the following ground, *viz.:*

That the said appeal could be retained only on the ground that the jurisdiction of the Court below was in issue, and for the purpose of determining that question alone, if it were presented by an appeal properly taken, certifying that question alone to the Court for decision, and the jurisdiction of the Court below is undoubted.

Francis P. Fleming
C. D. Rinehart
H. Bisbee

of Counsel for Appellees,

The appellants in the above stated cause, and W. W. Dewhurst, Esq., their counsel, are hereby notified that the foregoing motion will be submitted to the Supreme Court of the United States, at Washington, on Monday, the 8th day of January, A. D., 1900, unless the said cause shall be reached for hearing in regular order before said date, in which event the said motion will be argued and submitted at the same time that the said cause is argued and submitted on the merits.

Francis P. Fleming
C. D. Rinehart
H. Bisbee

of Counsel for Appellees.

I hereby accept service of the foregoing motion, and notice for submission thereof on Monday, January 8th, A. D. 1900, and also of a copy of the brief of Counsel for Appellees in support of said motion.

of Counsel for Appellants.

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HENRY L. MITCHELL *et al.*, Trustees, *et al.*,
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vs.

CHARLES M. FURMAN, Administrator, *et al.*,
Appellees.

No. 158.

Brief for Appellees on Motion to Dismiss Appeal or Affirm Decree.

STATEMENT OF CASE.

In this case an appeal has been taken from a decree of the Circuit Court of the United States for the Southern District of Florida, rendered on the 6th day of April, 1898, adjudicating that certain conveyances under which the appellants claimed title to parcels of land in Anastasia Island, St. Johns County, Florida, constituted clouds upon the title of the appellees thereto, and were null and void (Record, pages 98–100).

The appellees, all of whom were citizens of South Carolina, filed their bill of complaint against appellants, Henry L. Mitchell *et al.*, as the Board of Trustees of the Internal Improvement Fund of the State of Florida, The Florida Coast Line Canal and Transportation Company, a Florida corporation, the St. Johns Railway Company, a Florida corporation, John A. Henderson, a citizen of Florida, and Horace S. Cummings, a resident of the District of Columbia, in which it was averred that the appellees held title in fee simple, as tenants in common, to certain lands in St. Johns County, Florida, known as Anastasia or Saint Anastasia Island, except that portion of said island, in area about 200 acres, known at the time of the Spanish grant hereinafter mentioned as the "King's Quarries." It was averred that the said tract of land was granted by the Government of Spain to Jose or Joseph Fish, on or about June 19, 1795, and that the grant was ratified by the United States on February 19, 1821

The appellees set forth their chain of title, claiming to derive title through the said Joseph Fish.

It was averred that upon the making of the grant to the said Joseph Fish he was placed in possession, by the Spanish authorities, of the land granted to him, and up to the time of his death, resided thereon, cultivated an orange grove and fields thereon, which were inclosed by a substantial fence, and used the wood on said island for the supply of fuel and fencing timber, and improved the said property and exercised such acts of possession and control over the said land granted him as it was capable of.

It was further averred that from the time of the death of the said Joseph Fish, up to the filing of said bill, those claiming said land through the said Fish, by themselves or their agents and tenants, occupied the Fish homestead thereon, cultivated the fields, used the wood-

lands for fuel supply and fencing timber, paid taxes on the property when assessed for taxation, and exercised such acts of ownership and possession as said property was capable of, under the claim of title thereto.

It was further averred that under the Act of Congress, approved September 28, 1850, granting to the State of Arkansas and other States certain swamp and overflowed lands within their limits, the State of Florida claimed title to certain described lands which constituted part of said grant, and that the United States Government on or about September 18, 1856, issued a patent therefor to the State of Florida. It was further averred that the title to the lands granted the State of Florida under the said Act of Congress was by an act of the Legislature of the State of Florida, approved January 5, 1855, vested in certain State officers who were constituted the Board of Trustees of the Internal Improvement Fund of said State, with power to sell and transfer the lands so granted, and that Henry L. Mitchell, Governor of Florida, and the other defendants made parties as said board of trustees were then the board of trustees of the Internal Improvement Fund of the State of Florida.

It was averred that on April 8, 1895, and June 27, 1895, two other patents were issued by the United States Government to the State of Florida, embracing certain other described lands which constituted a part of the said grant to Joseph Fish, and that the said patents were issued on selections made by the State of Florida under an Act of Congress approved June 9, 1890, entitled "An Act to confirm certain entries and to warrant locations in the former Palatka military reservation in Florida." It was also averred that certain other described lands, constituting a part of the said grant to Joseph Fish, had been selected by the State of Florida under the Act of

Congress last mentioned, the selections approved by the Commissioner of the General Land Office of the United States, and that said lands were held to be patented to the State of Florida under said Act of Congress. It was alleged that the title to the lands patented under said Act of Congress, and to those selected, when a patent therefor should be issued, would, if the United States held title thereto, vest in the said Board of Trustees of the Internal mprovemen t Fund of the State of Florida.

It was averred that the said Board of Trustees of the Internal Improvement Fund of the State of Florida, at various designated times, had executed deeds to certain described portions of the lands embraced in said grant to Joseph Fish, to the respective defendants, The Florida Coast Line Canal and Transportation Company, the St. Johns Railway Company, and John A. Henderson, and that the said Florida Coast Line Canal and Transportation Company had executed to the defendant, Horace S. Cummings, a deed to a certain described portion of the lands claimed by it under said deed from the trustees of the Internal Improvement Fund of the State of Florida.

It was averred that the respective defendants asserted title, adversely to the complainants, to the various described portions of said lands claimed by each, and that the patents from the United States, the deeds of those claiming thereunder, and the said entries and selections by the State of Florida were invalid, and did not vest any title in the defendants to the lands claimed by them, respectively; that none of the defendants were in the actual possession of said lands, or any part thereof; and that the said patents, deeds and entries, constituted a cloud upon the title of complainants.

Answers under oath were waived, and it was prayed that the said patents, entries and deeds, by and under

which the defendants, respectively, claimed, should be set aside and declared void as clouds upon the title of complainants, and that the defendants should be enjoined from taking possession of the lands claimed by virtue thereof, or disturbing the possession of complainants.

A motion to dismiss the bill for want of jurisdiction, demurrer for want of jurisdiction, and a demurrer for want of equity, were filed by the defendants, each of which was overruled, and the defendants answered (Record, pages 11–19).

The answers put in issue the substantial allegations of the bill, so far as it sought to assert title and possession of the lands in controversy in the heirs of Joseph Fish. They averred, also, that the rights of the heirs of Fish were forfeited by failure to prosecute their "claim," under the limitation barring "claims" not presented as provided in the Acts of Congress of May 23, 1828, May 26, 1830, and June 22, 1860. They also averred that one C. M. Furman, through whom complainants claimed title, presented his claim to said lands to the Land Department of the United States in 1870, and that a hearing was thereafter had before the Commissioner of the General Land Office, who on August 2, 1890, rendered a decision against the heirs of Joseph Fish, which was affirmed by the Secretary of the Interior, and this was alleged to be a former adjudication in bar of complainants' rights.

A general replication was filed, and thereupon the cause was referred to a master, with directions to take testimony and report the same with his findings of law and fact to the court (Record, page 50).

Testimony was taken, and the master reported to the court, in substance, that he found the complainants' title as stated in their bill to be well founded; and also that the complainants and those under whom they claimed title, since 1824, had at all times, through their agents,

employees, servants and tenants, possessed and actually occupied a plantation known as the "Orange Grove" on said island, a little less in area than 100 acres, and claimed title to the whole of said island, except the reservation excepted from the grant, and exercised acts of ownership and control over the same (Record, pages 53, 54, 59, 60 and 64). He also found that the grant to Joseph Fish was a complete grant, vesting title in Fish, and that the land granted, being properly segregated from the public domain prior to January 24, 1818, stood ratified and confirmed by the King of Spain and the United States by virtue of the 8th Article of the Treaty of Cession. (Record, page 63.) He found—the grant being a complete one—that the limitations in the acts of congress in regard to the prosecution of "claims" were inapplicable; and he found also that the decision of the land department of the United States was not *res adjudicata*. (Record, page 63.) In conclusion the master found and reported: "That the complainants are vested with the valid, legal, and equitable title to the lands in controversy, and were and are seized and possessed of the same, or such portions thereof as are involved in this suit, with such seizin and possession as is sufficient under the law, to maintain their bill and have the relief prayed." (Record, page 63.)

An elaborate opinion was rendered by the master, which sets forth the reasons for his conclusions. (Record, pages 65–86.)

Exceptions were filed by the defendants to the master's report, all of which were overruled by the Court, and a decree was rendered confirming the report, and granting the complainants the relief prayed. (Record, pages 98-100.)

From that decree an appeal has been prosecuted by all the defendants, except John A. Henderson, who ap-

peared and refused to join therein, and the appellees now move to dismiss the appeal on the ground that this Court has not jurisdiction to hear and determine the same, under the provisions of the Act of March 3, 1891, establishing Circuit Courts of Appeal.

ARGUMENT.

The only cases in which an appeal or writ of error can be taken directly from a Circuit Court to the Supreme Court are the following:

"In any case in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below."

"From the final sentences and decrees in prize causes."

"In cases of conviction of a capital or otherwise infamous crime."

"In any case that involves the construction or application of the Constitution of the United States."

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

"In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

The appeal in the present case is not taken by virtue of the jurisdiction of the Court below being in issue, for that question alone has not been certified to the Court for decision. If the appeal can be sustained it must, therefore, be by virtue of the clause of the Act which permits

one "In any case in which the constitutionality of any law of the United States is involved, or the validity or construction of any treaty made under its authority, is drawn in question." No question as to the constitutionality of any law of the United States is involved. Is the *validity or construction* of any treaty *drawn in question?* Certainly the validity of a treaty is not drawn in question; nor is the construction of a treaty. There is no jurisdiction unless the Circuit Court was required "to pass on the question of validity or construction in disposing of the rights asserted."

Borgmeyer vs. Idler, 159 U. S., 408.

The construction of the treaty with Spain could not be drawn in question, for it had been settled by repeated adjudications of this Court, and was thus beyond question.

State vs. Bradley, 26 Fed. Rep., 289.

If the Spanish grant were a complete one, which vested title in the grantee, it stood confirmed by the treaty. If it were not, it did not.

U. S. vs. Wiggins, 14 Peters, 334.

U. S. vs. Percheman, 7 Peters, 51.

The determination of the category within which the grant fell in no way involved either the validity or construction of the treaty. The treaty was an entirely collateral matter.

Muse vs. Hotel Company, 168 U. S., text 437.

Gill vs. Oliver, 11 Howard, 529.

The Pilot, 53 Fed. Rep., 11.

It is clear, therefore, that an appeal can not be sustained by this Court, upon the ground relied upon by appellants, and the appeal should be dismissed.

THE APPEAL CAN NOT BE SUSTAINED ON THE GROUND THAT JURISDICTION OF THE COURT BELOW WAS IN ISSUE.

Supposing it should be attempted to sustain the appeal on the theory that the jurisdiction of the Court below was in issue, the Act of Congress has not been complied with by the appellants, for that question alone has not been certified to the Court for decision. On the contrary, the main grounds of complaint disclosed by the errors assigned relate solely to questions affecting the merits of the controversy, and the Court would be justified in dismissing the appeal on that ground, for there is no certificate of the Circuit Court showing that the question of its jurisdiction was in issue, nor does it clearly and distinctly appear from the record that the jurisdiction of that Court was in issue.

Maynard vs. Hecht, 151 U. S., 324.

Colvin vs. Jacksonville, 157 U. S., 368.

Building & Mfg. Co. vs. Barber, 157 U. S., 373.

The Bayonne, 159 U. S., 687.

Van Wagenen vs. Sewall, 160 U. S., 369.

There is an assignment of error, that "The Court erred in denying the motion of the defendants to dismiss the said suit, for want of jurisdiction, and in taking jurisdiction of said cause", (Record, page 104) but upon what

is this alleged error predicated? A reference to the motion to dismiss for want of jurisdiction will show that not a single ground really put in issue the jurisdiction of the Court. The motion was addressed to matters that could only properly have been available on plea or general demurrer. (Record, page 11). This, also, is true of a so-called "Demurrer to jurisdiction. (Record, page 14). There is one ground of a separate motion filed by one defendant, Horace S. Cummings, which would have raised a question as to the jurisdiction, so far as he was concerned, *viz.*, that he was a citizen of the District of Columbia, and not of a State (Record, page 13); but jurisdiction was not invoked on the ground of diverse citizenship. The bill was one to remove a cloud upon complainants' title, which arose through the United States, under the Acts of Congress mentioned, undertaking to convey the lands in controversy to the State of Florida, whereby the State's title thereto became vested in the defendants who constituted the board of trustees of the Internal Improvement Fund of the State; and the other defendants claimed through them. The controversy thus arose under the laws of the United States.

Doolan vs. Carr, 125 U. S., 618.

Spokane Falls &c. R. Co. vs. Ziegler, 167 U. S., 65.

Pierce vs. Molliken, 78 Fed. Rep., 196.

And the suit, being one to remove a cloud upon the title to real estate within the jurisdiction of the Court, could be maintained irrespective of the place of residence of any defendant.

Dick vs. Foraker, 155 U. S., 404.

Besides, jurisdiction could have been maintained on the ground of diverse citizenship. All the complainants were citizens of South Carolina, and all the defendants, except Cummings, of Florida. (Record, page 1). The controversy as to Cummings was a separable one, relating only to a separate tract of 160 acres of land described in the bill, out of a total of 7,500 acres (Record, pages 4, 99), and even were it a fact that the Court did not have jurisdiction of Cummings, that would not be available on a joint appeal by all defendants, assigning errors jointly. Had Cummings assigned error separately, the only result would be that the error, if found to exist as to him, would require the reversal of the decree as to him, while the decree would necessarily be affirmed as to the other defendants.

It might further be contended that the jurisdiction of the Court below was in issue because it is contended by the eighth error assigned that "The Court erred in decreeing any relief against the State of Florida, the real defendant sued through the trustees of the Internal Improvement Fund". (Record, page 106). Obviously, however, this objection to the jurisdiction is frivolous, for suits have been repeatedly sustained against the same trustees in the same capacity.

Shoecraft vs. Bloxham *et al.*, 124 U. S., 730.

Trustees vs. Greenough, 105 U. S., 527.

If the appeal should be retained as presenting a question of the jurisdiction of the Court below, the decree appealed from should be affirmed on this motion.

Respectfully submitted,

A. Bisbee
Francis P. Fleming
C. D. Rinehart
Counsel for Appellees.